MAY
JAMES R. B

Supreme Court of the United States

October Term, 1961

NO. [redacted]

BAUER-SMITH DREDGING CO., INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Defendant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

T. G. SCHIRMEYER
761 San Jacinto Building
Houston 2, Texas
Attorney for Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES	5
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	16
APPENDIX A	17
APPENDIX B	21
APPENDIX C	41

LIST OF AUTHORITIES

CASES

Admiral Oriental Lines v. United States, 86 F.2d 201	3, 12, 14
Bauer-Smith Dredging Co. v. Tully, et al., 305 S.W.2d 805	9
Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 367, 367 (5 CA), cert. den. 341 U.S. 934	10
I. H. Smith Co. v. Wartfemus, 201 Md. 367, 93 Atl.2d 764, 766	13
Jemison v. The Dredge Duplex, 163 F.Supp. 947 (D.C. Ala.)	5, 14
Ozark Dam Constructors v. United States, 130 Ct.Cl. 354, 359, 127 F.Supp. 187, 190	5, 14
Plumley v. United States, 226 U.S. 544	11
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124	3, 13
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627	10
United States v. Atlantic Dredging Co., 35 Ct.Cl. 354, 359, aff. 253 U.S. 1, 10, 11, 12	14
United States v. McShain, 308 U.S. 515	11
United States v. Moorman, 338 U.S. 457	2, 3, 11
Whitaker v. Colman, 115 F.2d 305, 307 (5 CA)	10
Yearsley v. W. A. Ross Construction Co., 309 U.S. 18	3, 4, 12

UNITED STATES STATUTES

Act of March 3, 1925, House Doc. 238—68th Congr., 1st Sess.; 43 Stat. at Large 1186	7
Civil Functions Appropriation Act, 1952, Public Law 203, 82d Congr., 1st Sess., Chap. 556 (H.R. 4386), Vol. 1 of 1951, Sess., p. 632, United States Congr. and Adminis. Service	7
28 U.S.C. 1255(1)	2
33 U.S.C. 1	5
33 U.S.C. 408	5
33 U.S.C. 540	6
33 U.S.C. 621	6
33 U.S.C. 622	7
41 U.S.C. 54.13(10)	4, 5, 7

TEXTS

19 A.L.R. 226, 253	13
2 Am. Jur. 13, 14, 16, 17	13
Restatement of the Law of Agency (2nd Ed.), Secs. 82, 101	3
Restatement of the Law of Agency (2nd Ed.), Secs. 432, 438, 439(c)(d)(e)	3, 13

Supreme Court of the United States

October Term, 1961

NO._____

BAUER-SMITH DREDGING CO., INC., *Petitioner*
versus
UNITED STATES OF AMERICA, *Defendant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review a ruling of the United States Court of Claims, wherein a Motion for Summary Judgment filed by the United States was granted and a Motion for Summary Judgment filed by Petitioner was denied in an indemnity action involving the breach of a Federal dredging contract by United States.

OPINION BELOW

The opinion of the United States Court of Claims in support of its ruling on Motions for Summary Judgment is unreported but is printed in Appendix A hereto attached, infra, p. 17.

JURISDICTION

The ruling on Motions for Summary Judgment was made on December 1, 1960, and an order denying a Motion for Rehearing was entered on March 1, 1961. The jurisdiction of this Court is invoked under 28 USC 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims may, on a Motion for Summary Judgment, dismiss the pleading of a Federal dredging contractor when fact issues are raised as to the proper performance of a Federal contract and where it is uncontested that the Government plans and specifications are inaccurate and erroneous and that various contractual warranties have been breached by the Government, as outlined in the attached pleading, Appendix B, p. 21.[1]

2. Whether the Court of Claims may disregard the principles of law stated in *United States v. Moorman,* 338 U.S. 457, and deny a Government contractor the right to indemnity on the ground that the dredging services were not performed in accordance with the Federal plans and specifications, when it is undisputed that the Secretary of Army, through his official representatives, certified that a Federal contract was properly performed according to Government plans and specifications.[2]

3. Does the United States adopt and ratify the acts of its contractor where the Federal Government, with full knowl-

---

[1] See Court of Claims Rule 51(d), which provides that if there are issues as to any material fact, a summary judgment cannot be granted.

[2] According to the argument of the Justice Department in the **Moorman Case,** the decision of a Federal Contracting Officer is binding on all courts. See Annotation in 91 L.Ed. 761. See Record pp. 6 and 12.

edge of alleged third party property damage claims, certifies that the Federal contractor performed his work in accordance with Government plans and specifications and to the complete satisfaction of the United States?[3]

4. Is the United States estopped to deny that its contractor failed to properly perform a Government dredging contract according to plans and specifications, after the Government's Contracting Officer approved and certified that the dredging work was performed in accordance with the Government's plans and specifications and further where the United States as a party to the contract does not contest this fact or question the good faith of its Contracting Officer?[4]

5. Is a Federal contractor entitled to receive indemnity, as a matter of law, where the United States fails to controvert the pleaded issue that third party property damage occurred as a normal and necessary incident to the prosecution of a Federal dredging contract, the proper performance of which was certified to by the Government's Contracting Officer?[5]

---

[3] This question is answered in the affirmative by **Yearsley v. W. A. Ross Construction Co.**, 309 U.S. 18, and **Restatement of the Law of Agency** (Second Edition), Sections 82, 101.

[4] The rational of **United States v. Moorman**, 338 U.S. 457, and related cases of the Court of Claims, require an affirmative answer to this question. The Court of Claims' negative answer finds no support in law.

[5] The Court of Claims, in its decision, states that Petitioner does not claim that third party property damages occurred as a necessary incident to placing spoil in designated areas. This is clearly in error. See Appendix, pp. 22-23, 43. According to the legal principles stated in **Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.**, 350 U.S. 124, and **Admiral Oriental Lines v. United States**, 86 F.2d 201, the Petitioner is entitled to indemnity. Also see **Restatement of the Law of Agency**, Sections 132, 438, 439(c)(d)(e).

6. Whether the Court of Claims may, in a contract action, adopt as "final" the fact findings in a State Court negligence action against a Federal contractor when it is undisputed that the United States, with ample and timely notice of the tort suit, refused to be a party to the tort action" and could not be impleaded by reason of its sovereign immunity and where the Federal Contracting Officer's findings conflict with the State court's findings.[6]

7. Whether the Court of Claims may, without any fact evidence before it, rule that a dredging contractor is not an "agent" of the United States, when such a ruling is contrary to the River and Harbor Act, wherein the Secretary of the Army is granted the non-delegable duty of controlling and prosecuting dredging work conducted in the navigable waters of the United States, and where Congress has not granted any of these non-delegable duties to private dredging contractors and where this Court has declared in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 22, that a private contractor performing dredging work for the United States is an "agent" of the United States.

8. Whether Federal agencies of the Executive Branch of the Government are immune from contractual liability and may avoid the legal consequences of their own contractual errors and mistakes and breach of warranties by relying on a Federal standard contract clause, 41 USC 54.13(10), referred to as the "Responsibility Clause", and which reads as follows:[7]

---

[6] The doctrine of res adjudicata and equitable estoppel adopted by the Court of Claims is inapplicable because the tort action in the State Court and the Court of Claims contract action are different and the parties to these lawsuits are different.

[7] As far as can be determined, the Supreme Court has not ruled on this question. According to the decision in **Jemison v. The**

"The contractor shall, without additional expense to the Government, . . . be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work performed and shall be responsible for all materials delivered and performed until completion and final acceptance, except for any completed unit thereof which may theretofore have been finally excepted."

STATUTES

Title 33 USC 1, *Regulations by Secretary of Army for Navigation of Waters, Generally*

"It shall be the duty of the Secretary of Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property or of operations of United States in channel improvements, covering all matters not specifically delegated by law to some other executive department. . . ." August 18, 1894, c. 299, Sec. 4, 28 Stat. 362; June 3, 1902, c. 1079, Secs. 6, 11, 32 Stat. 374; August 8, 1917, c. 49, Sec. 7, 40 Stat. 266.

Title 33 USC 408, *Taking Possession of, Use of, or Injury to Harbor or River Improvements*

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose,

---

Dredge Duplex, 163 F.Supp. 917 (D.C. Ala.), a negative answer is required. There is no legal support for the Court of Claims ruling. As between United States and Petitioner the issue of fault or negligence has never been resolved. **Ozark Dam Constructors v. United States**, 130 Ct. Cl. 253, 259, 127 F.Supp. 187, 190.